

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellants: Richard J. Mehus, Charles Confirmation No. 9839
A. Hodge and Quang Van
Dao

Serial No.: 10/602,384

Filed: June 24, 2003 Customer No.: 28863

Examiner: Samuel P. Siefke

Group Art Unit: 1797

Docket No.: 1092-015US01/1653US01

Title: CONCENTRATION MONITOR

CERTIFICATE UNDER 37 CFR 1.8 I hereby certify that this correspondence is being transmitted via the United States Patent and Trademark Office electronic filing system on June 4, 2009.

By: Nancy J. Burr
Name: Nancy J. Burr

REPLY BRIEF

Mail Stop Appeal Brief—Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313

Sir:

This is a Reply Brief in response to the Examiner's Answer mailed April 14, 2009 in the above-identified application.

No fee is believed due. Please charge any deficiencies or credits to Deposit Account No. 50-1778.

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STATUS OF CLAIMS

A. TOTAL NUMBER OF CLAIMS IN APPLICATION:

Claims 1-7, 18-22 and 24

B. STATUS OF ALL THE CLAIMS:

Claims allowed: None

Claims objected to: None

Claims rejected: 1-7, 18-22 and 24

Claims cancelled: 8-13, 23 and 25

Claims withdrawn from consideration: 14-17

C. CLAIMS ON APPEAL: 1-7, 18-22 and 24

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Appellant submits the following ground of rejection to be reviewed on Appeal:

- (1) The first and only ground of rejection to be reviewed is the rejection of claims 1-7, 18-22 and 24 under 35 U.S.C. § 103(a) as being unpatentable over Nomura et al. (U.S. 6,706,533).

ARGUMENT

In the Final Office Action mailed on October 20, 2008, the Examiner rejected claims 1-7, 18-22 and 24 under 35 U.S.C. § 103(a) as being unpatentable over Nomura et al. (U.S. 6,706,533).

In Appellant's Appeal Brief filed March 12, 2009, Appellant respectfully traversed this rejection, and requested reversal by the Board of Patent Appeals based on the arguments presented therein. For example, Appellant argued that the pending claims make an additional distinction that is not taught or suggested in Nomura, i.e., a distinction between the product or "agent" in the selected use solution and the product classification of the product. Namely, as recited in claim 1, the product (or "agent") has a particular product classification, which in turn is associated with one of the plurality of predetermined algorithms. In other words, rather than calculating the concentration based on a predetermined algorithm associated with each product (or "agent") as taught by Nomura, claim 1 recites that the controller calculates a concentration of a product in the selected use solution based one of the plurality of predetermined algorithms associated with a product classification of the product in the selected use solution.¹

In response to this argument, the Examiner's Answer asserts that "product classification" is mentioned only one time in the specification.² However, the Examiner's Answer offers no explanation as to why this assertion has any impact on the determination of obviousness. Nor does it take into the account the fact that "product class" is discussed in detail throughout Appellant's specification at, for example, page 1, lines 2 and 4; page 2, lines 4, 16, 18, 20, 26, and 30; page 3, lines 3 and 21; page 6, lines 8, 9 and 12; page 9, lines 16, 18, 20-21, 24, 29, 30 and 33; and page 10, lines 24 and 28.

Appellant respectfully submits that the terms "product class" and "product classification" as described in Appellant's specification are substantially equivalent and that thus the Examiner's assertion that the specification includes only one mention of the term "product classification" is in error.

In addition, the Examiner's Answer, like the Final Office Action, still does not address the fact that Nomura contains absolutely no teaching or suggestion concerning product classifications (or class) much less teaching or suggesting a memory that stores a plurality of

¹ Appellant's Appeal Brief dated March 12, 2009, pages 4-7.

² Examiner's Answer, page 9, lines 6-7.

predetermined algorithms, each associated with a different one of a plurality of product classifications, and a controller that calculates a concentration of a product in the selected use solution based on the resistivity, the temperature and a predetermined algorithm associated with a product classification of the product in the selected use solution, as recited in Appellant's independent claim 1. Instead, without making any kind explanation as to why the pending claims would have been obvious, the Examiner's Answer simply makes the conclusory leap from a product or "agent" to product classification without ever providing any teaching, suggestion or rational reason for doing so. This failure of the Final Office Action is discussed in detail in Appellant's Appeal Brief.³

Without such teaching or suggestion, or without some other rational reason why one of ordinary skill in the art would have made the necessary modifications, the rejection under 35 U.S.C. § 103(a) over Nomura cannot be sustained.⁴

For at least these reasons, and the reasons discussed in Appellant's Appeal Brief, the Examiner has failed to establish a *prima facie* case of non-patentability of Appellant's claims 1-7, 18-22 and 24 under 35 U.S.C. § 103(a). Furthermore, the Examiner has provided no other rational reason why one of ordinary skill in the art would have made the modifications necessary to arrive at the claimed invention. Reversal of this rejection is therefore respectfully requested.

³ See, e.g., Appellant's Appeal Brief at pages 6-7.

⁴ As stated in MPEP § 2141, the key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious. The Supreme Court in *KSR International Co. v. Teleflex Inc.* (*KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 82 USPQ2d 1385 (2007)) noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit. The Court, quoting *In re Kahn* (*In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006)) stated that "[R]ejections on obviousness cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness."

CONCLUSION

In view of the foregoing remarks, and the remarks in Appellant's Appeal Brief filed March 12, 2009, Appellant respectfully requests reversal of the outstanding rejection of claims 1-7, 18-22 and 24 under 35 U.S.C. §103(a) as being unpatentable over Nomura.

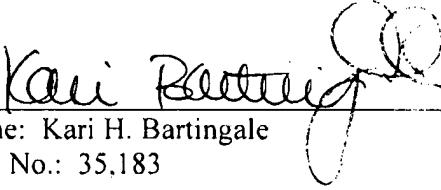
Please charge any additional fees or credit any overpayment to deposit account number 50-1778.

Respectfully submitted,

Date: June 4, 2009

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